No. _____

IN THE

Supreme Court of the United States

BLAINE MILAM

Petitioner,

V.

TEXAS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

PETITIONER'S APPENDIX

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APPENDIX TABLE OF CONTENTS

APPENDIX A

Filed 11/1/2023 3:11 PM
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DISTRICT COURT NO. CR 09-066
(TEXAS COURT OF CRIMINAL APPEALS NO. WR 79,322-04)

Ex parte	§	IN THE 4TH JUDICIAL
BLAINE KEITH MILAM,	§	
Applicant	§	DISTRICT COURT OF
	§	
	§	RUSK COUNTY, TEXAS

STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to this Court's order, the State submits the attached document as its proposed findings of fact and conclusions of law in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing pleading was served by electronic means on October 9, 2023, and by placing same in the United States mail, postage prepaid, on the same day, sent to:

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DISTRICT COURT NO. CR 09-066
(TEXAS COURT OF CRIMINAL APPEALS NO. WR 79,322-04)

Ex parte	§	IN THE 4TH JUDICIAL
BLAINE KEITH MILAM,	§	
Applicant	§	DISTRICT COURT OF
	§	
	§	RUSK COUNTY, TEXAS

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Court, having considered the Applicant's second subsequent application for writ of habeas corpus, the State's Amended Response, the official court documents and records in cause number 09-066, the evidence presented by both parties at the evidentiary hearing on May 30 and 31, 2023, and final briefing, makes the following findings of fact and conclusions of law (FFCL):

FINDINGS OF FACT

I. Procedural History

1. Applicant, Blaine Keith Milam, was indicted on March 10, 2009, by the Grand Jury of the 4th Judicial District Court, in cause No. 09-066, on four counts of the capital offense of knowingly causing the death of Amora Bain Carson, an individual younger than six years of age. *See* 1 CR 1–4; 39 RR 42–43;[1] Tex. Penal Code § 19.03 (a)(8).

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[1] "CR" refers to the Clerk's Record—the transcript of pleadings and documents filed with the clerk during trial, preceded by volume number and followed by page

2. After a change of venue, a Montgomery County jury convicted Applicant of capital murder and sentenced him to death in May 2010. *See* 41 RR 235–36.

3. Applicant's conviction was affirmed on direct appeal on May 23, 2012. *Milam v. State,* No. AP-76,379, 2012 WL 1868458 (Tex. Crim. App. 2012). He did not seek certiorari review of this decision, and his conviction became final on August 21, 2012.

4. On September 11, 2013, the Texas Court of Criminal Appeals (CCA) adopted the trial court's—the Honorable J. Clay Gossett's—recommended FFCL and denied state habeas relief. *Ex parte Milam,* No. WR-79,322-01, 2013 WL 4856200 (Tex. Crim. App. 2013).

5. On August 16, 2017, the United States District Court for the Eastern District of Texas, Sherman Division, the Honorable Ron Clark presiding, denied federal habeas relief and a certificate of appealability (COA). *Milam v. Director, TDCJ-CID,* No. 4:13-cv-545, 2017 WL 3537272 (E.D. Tex. 2017).

6. On May 10, 2018, the Fifth Circuit Court of Appeals also denied COA. *Milam v. Davis,* 733 F. App'x 781 (5th Cir. 2018).

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number. "RR" refers to the Reporter's Record of the transcribed state trial proceedings.

7. The United States Supreme Court denied certiorari review on October 9, 2018. *Milam v. Davis,* 139 S. Ct. 335 (2018).

8. On September 11, 2018, the trial court signed an order setting Applicant's execution date for January 15, 2019.

9. On September 17, 2018, Applicant's appointed federal habeas counsel, Don Bailey, filed a motion to substitute counsel. *Milam v. Director,* No. 4:13-cv-545 (E.D. Tex.) (ECF No. 40).

10. The district court granted the motion on October 4, 2018, and appointed Jennae Swiergula of the Texas Defender Service and Jeremy Schepers of the Federal Public Defenders Office. *Milam v. Director,* No. 4:13-cv-545 (E.D. Tex.) (ECF Nos. 42-44).

11. On January 7, 2019, Applicant filed his second state habeas application and a motion for stay of his execution date.

12. On January 14, 2019, the CCA granted Applicant's motion for stay, concluding he had "met the dictates of [Texas Code of Criminal Procedure] Article 11.071 § 5(a)(1) with regard to his first two allegations," stayed his execution, and remanded these claims to the trial court for a review on the merits. *Ex parte Milam,* No. WR-79,322-02, 2019 WL 190209 (Tex. Crim. App. 2019).

13. The State submitted Proposed FFCL on September 11, 2019, while Applicant submitted none.

14. On October 16, 2019, this Court signed the State's Proposed FFCL, recommending denial of both claims. *See* State's Proposed FFCL, and Order (signed by trial court on Oct. 16, 2019) (State's Ex. F at 890–971).[2]

15. On July 1, 2020, the CCA denied habeas relief, based upon the trial court's proposed findings (with several noted exceptions)[3] and the CCA's own review. *Ex parte Milam*, No. WR-79,322-02, 2020 WL 3635921, at *1 (Tex. Crim. App. July 1, 2020), *cert. denied, Milam v. Texas*, 141 S. Ct. 1402 (2021).[4]

16. On August 11, 2020, the trial court signed an order resetting Applicant's execution date for January 21, 2021.

17. Applicant filed his second subsequent application for habeas relief on January 12, 2021, again raising an intellectual disability claim but now

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[2] State's Exhibits A–F are contained in the appendix filed concurrently with the State's Amended Answer to Subsequent Application for Post-conviction Writ of Habeas Corpus.

[3] The CCA did not adopt FFCL ##'s 29, 33, 170–77, 183, and the portion of #239 stating that the ID claim was barred by *Teague v. Lane,* 489 U.S. 288 (1989). *See Ex parte Milam,* No. WR-79,322-02, 2020 WL 3635921, at *3 (Tex. Crim. App. July 1, 2020).

[4] Applicant's federal appeal of this decision was also unsuccessful. *See In re Blaine Milam,* 838 F. App'x 795, 798–800 (5th Cir. 2020) (unpublished) (denying Applicant's request for permission to collaterally challenge the CCA's decision and file an *Atkins* claim in the federal district court); *In re Milam,* No. 20-40849 c/w No. 20-70024, 832 F. App'x 918 (5th Cir. Jan. 8, 2021), *cert. denied, Milam v. Lumpkin,* 142 S. Ct. 172 (2021) (affirming transfer to Fifth Circuit of unauthorized successive petition filed in district court, and denying motion for stay).

founded on a recent change in the State's expert's opinion, and a motion for stay of execution.

18. The CCA granted Applicant's motion for a stay and remanded his second subsequent writ to the trial court for a review of his intellectual disability claim on the merits, pursuant to Article 11.071 § 5(a)(3). *See Ex parte Milam*, No. WR-79,322-04, 2021 WL 197088, at *1 (Tex. Crim. App. Jan. 15, 2021).

19. On June 1, 2021, the State filed an opposed motion to have Applicant retested under the most current diagnostic standards and applicable caselaw.

20. The trial court granted the State's motion and appointed Dr. Antoinette McGarrahan to perform the examination. *See* Order (filed July 7, 2021); Order Suppl. Order Authorizing Evaluation of July 7, 2021 (filed Aug. 17, 2021).

21. The State filed an initial Answer to Subsequent Application for Post-conviction Writ of Habeas Corpus on July 14, 2021, asking the trial court to delay ruling until the conclusion of Dr. McGarrahan's evaluation and submission of her report and conclusions.

22. Dr. McGarrahan met with Applicant at TDCJ on September 13 and 14, 2021, and performed a clinical interview, mental status examination,

and intellectual and neuropsychological assessment. EHSX[5] 4; *see also* State's Ex. A at 002 (McGarrahan Report).

23. Dr. McGarrahan concluded that Applicant did not meet the criteria set out by the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5)[6] and American Association on Intellectual and Developmental Disabilities (AAIDD) manual for Intellectual Disability. EHSX 4, at 8–9.

24. The State filed State's Amended Answer to Subsequent Application For Post-Conviction Writ of Habeas Corpus on August 19, 2022, incorporating Dr. McGarrahan's findings and seeking a limited evidentiary hearing permitting testimony from Dr. McGarrahan, Dr. Timothy Proctor, and any other expert witness previously proffered by Applicant in support of his successive habeas application.

25. On November 21, 2022, the trial court signed an order designating as a controverted, unresolved factual issue to be resolved at a live evidentiary hearing: Whether, under current medical and legal standards for evaluating

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5 "EHRR" refers to the Reporter's Record for the evidentiary hearing held on May 30 and 31, 2023, preceded by volume number and followed by page number. "EHSX" refers to State's Exhibits, while "EHDX" refers to Applicant's Exhibits. Either will be followed by exhibit number and page number where appropriate.

6 The DSM-5 has since been revised, including revisions to the ID diagnosis section. At the hearing, the experts referred to the most current version, the DSM-5-TR.

intellectual disability, experts would find Applicant to be intellectually disabled. The trial court limited the hearing "to the presentation of expert witnesses whose opinions are relevant to the determination of whether [Applicant is ID]."

26. On December 7, 2022, the trial court set the hearing for May 30 and 31, 2023, in the 4th Judicial District Courtroom, Rusk County Courthouse, Henderson, Texas.

27. At the hearing, Applicant presented testimony from Dr. Proctor, and rebuttal testimony from Dr. Alan Kaufman. Applicant designated Dr. Jack Fletcher as a witness on his pre-hearing witness list but did not call him to testify. The Court notes that Dr. Fletcher was present in the courtroom for a portion of the evidentiary hearing. The State presented testimony from Dr. McGarrahan.

28. At the conclusion of the evidence, the trial court ordered the parties to submit closing arguments in the form of briefing (filed concurrently) and Proposed FFCL.

29. This Court incorporates by reference the relevant factual findings from the Proposed Findings of Fact and Conclusions of Law—signed by the trial court on October 16, 2019, and adopted by the CCA on July 1, 2020—regarding lay witness testimony and evidence not contested by the evidence

from this hearing. *Ex parte Milam*, No. WR-79,322-02, 2020 WL 3635921, at *1; *see* State's Ex. F (FFCL) at 909–34, ¶¶81–137.

II. Prior Determinations Related to Intellectual Disability.

30. The jury rejected Applicant's intellectually disability defense by answering in the negative the special issue, "Do you find, by a preponderance of the evidence, that the defendant, Blaine Keith Milam, is a person with [intellectual disability]?" *See* 4 CR 985–88; 56 RR 167–69.

31. Applicant did not seek review of the jury's decision and did not raise a claim pursuant to *Atkins v. Virginia,* 536 U.S. 304 (2002), until his first subsequent state habeas writ application, filed days before his first scheduled execution date, where Applicant argued that, pursuant to *Atkins*, his execution would violate the Eighth and Fourteenth Amendments because he is intellectually disabled.

32. Following a stay and remand by the CCA pursuant to Article 11.071 § 5(a)(1), because of "recent changes in the law pertaining to the issue of intellectual disability," namely, *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*), and *Hall v. Florida,* 572 U.S. 701 (2014), *see Ex parte Milam,* 2019 WL 190209, at *1, the CCA denied habeas relief, based upon the trial court's findings (with several noted exceptions) and the CCA's own review, *Ex parte Milam*, 2020 WL 3635921, at *1. Those findings included an alternative merits conclusion that Applicant failed to demonstrate by clear and convincing evidence such that no

rational factfinder would fail to find him intellectually disabled. *See* State's Ex. F at 951–69, ¶¶185–220, 227–38; *Ex parte Milam,* No. 79,322-02, 2020 WL 3635921, at *1.

III. Findings of Fact Related to Dr. Proctor

A. Trial testimony

33. At trial, Dr. Proctor, relying on testing he performed as well as that performed by non-testifying defense expert Dr. Paul Andrews, concluded that Applicant's test scores failed to demonstrate subaverage intellectual functioning. 54 RR 143–50; 55 RR 135–36. Those scores included Dr. Andrews's administration of the Wechsler Intelligence Scale, Fourth Edition (WAIS-IV), on which Applicant obtained a full-scale IQ score (FSIQ) of 71, and the Stanford-Binet Intelligence Scales, Fifth Edition (SB5), on which Applicant obtained an IQ score of 80; and Dr. Proctor's administration of the Reynolds Intellectual Assessment Scales (RIAS), on which Applicant scored an 80, and a second WAIS-IV, on which Applicant obtained an FSIQ score of 68. 53 RR 200–02; 55 RR 135–37, 140–41, 149–55.

34. Dr. Proctor believed that the second WAIS-IV of 68 should have been higher, given the "practice effect," and attributed the lower score to possible distraction due to a window in the testing room or background noise. 55 RR 151–53.

35. Both Dr. Andrews and Dr. Proctor agreed that it was unusual for someone to score better on the SB5 than the WAIS-IV. 55 RR 155–56.

36. Both doctors agreed that a lack of education can affect IQ testing; Dr. Proctor also suggested anxiety, depression, emotional upset, and drug abuse could impact testing. 55 RR 165–66.

37. Dr. Proctor found significant that Applicant's reading comprehension scores were in the eighth-grade range, although his education ended at the fourth grade, and persons with mild intellectual disability can read at most at a sixth-grade level. 55 RR 162–64; *but see* 1 EHRR 29–30 (DSM-5-TR no longer includes this sixth-grade level ceiling).

38. Both doctors agreed Applicant could read well. 55 RR 165.

39. Dr. Proctor opined that, given the five-point standard error of measurement (SEM), Applicant was someone with below average intellectual functioning, in the borderline range, but he did not believe Applicant showed significantly sub-average intellectual functioning. 55 RR 149–50, 160, 165.

40. Regarding adaptive deficits, Dr. Proctor disagreed with Dr. Cunningham's results suggesting Applicant had the adaptive functioning of a three-or four-year-old, 55 RR 176, finding the opinion inconsistent with testimony regarding Applicant's his work history and vocational ability, 55 RR 176–77, 255–57; and finding Dr. Cunningham's reliance on Applicant's mother and sister as sources of information not credible. *See* 55 RR 172–76.

41. Dr. Proctor opined at trial that Applicant had some adaptive deficits as well as strengths, but he did not show *significant* deficits to the level required to demonstrate deficits in adaptive functioning, 55 RR 177, 257, and suggested Applicant's adaptive deficits could be caused by something other than intellectual disability such as drug use, lack of opportunity, deprived environment, or laziness. 55 RR 257–59.

42. Witness testimony supported Dr. Proctor's trial opinions. *See* 49 RR 72 (testimony from Ranger Ray regarding work history, knowledge regarding job); 55 RR 27–29, 37 (Community Health Core employee assessed Applicant—seemed of average intelligence given vocabulary, ability to answer questions, lack of lapses in speech and memory); 51 RR 270, 277 (first job at age 15, held for two years); 50 RR 22–37 (Bryan Perkins, supervisor at Big 5 Tire & Auto, Applicant's performance was excellent, began training for job as salesman, no trouble learning to use computer, one of the best employees he had until he stopped coming to work); 51 RR 325–27 (Applicant stopped going to work around time he started using methamphetamine again); 54 RR 263–71 (co-worker Gary Jenkins, Applicant could perform job tasks, operate machinery without problem, did well in training, performed job duties without prompting). *See* State's Ex. F at 929–30, ¶¶133–34(a).

43. Substantial testimony from teachers and educators also supported Dr. Proctor's trial opinions. *See* 51 RR 9, 14, 26–27, 32–33, 35 (grade-school

teachers Nelda Thornton and Carolyn McIlhenny: he was a slow student with low grades but was frequently absent due to health issues and an overprotective mother; could have been a better student if he attended school); 54 RR 294–97 (Melanie Dolive, a special education teacher, testified, from personal observation of Applicant [she was not his teacher], that nothing in his behavior led her to believe there was anything wrong with him); 54 RR 313–15 (Sherry Brown, a retired teacher who regularly interacted with Applicant: he could do the assigned work, attributed difficulties to his repeated absences, never felt the need to refer for ID screening); 55 RR 78–85 (Melynda Keenon, Applicant's cousin who homeschooled her children and served as a community advisor for those considering homeschooling, met with Applicant to determine his learning style for homeschooling, recommended online classes; Applicant would do whatever work she put in front of him); 55 RR 89–100, 117–18, 121 (neighbor Sarah Hodges, homeschooled her children, gave Applicant schoolwork to do that was below his grade level because he was behind, but at the same level as children the same age); *see also* State's Ex. F at 920–21, 931–33, 956–58, ¶¶114–15, 134(b–c, f–j), 198–99, 204.

44. Applicant's parents removed him from school in the fourth grade after he was paddled by the school principal, 51 RR 237–38, but stopped homeschooling him after six months, 51 RR 239–40. *See* State's Ex. F at 922–23, 931, ¶¶119, 134(d-e).

45. Applicant's school records reflect that he was never held back, he was routinely absent, and he was evaluated by the special education department and identified as having a speech impediment but no other disability. *See* 51 RR 7–8, 13–15, 30–31; 54 RR 163–66, 305–10; SX 298, 300; 54 RR 321–23 (Cindy Smith, Special Education Director for Rusk County Shared Services Arrangement, examined Applicant's school records and testified that his last full and independent evaluation, dated February 8, 2000, indicated a speech impediment only); 55 RR 178–80 (Dr. Proctor); *see* State's Ex. F at 917–18, 922–23, 931, 934, 956–57, ¶¶106–08, 119, 134(b, c, f–h), 137, 198–99.

46. Finally, at trial, Dr. Proctor found no evidence to support onset of ID before the age of eighteen, citing Applicant's school records indicating a speech impediment, but leaving blank a section where a secondary diagnosis could have been indicated, 55 RR 178, 180, and a letter from the school district indicating Applicant had undergone a full and individual evaluation in 2000 but noting no intellectual-disability diagnosis, 55 RR 178–79; *see also* 51 RR 7–8, 13–15, 30–31; 54 RR 163–66, 305–10, 321–23; SX 298, 300; State's Ex. F at 934, ¶137.

B. Post-trial evidence and hearing testimony

47. In late December 2020, with the State's permission, Applicant asked State's expert witness, Dr. Proctor, to reconsider his opinion on

intellectual disability by reviewing the additional materials that had been proffered to the CCA as part of Applicant's first subsequent habeas application,[7] including a scoring error discovered on one of the higher IQ scores—the SB5 score of 80. *See* Proctor Addendum at 1 (Second Subsq. Appl. Ex. 1).

48. After a cursory review of this evidence, Dr. Proctor changed his opinion. *See* Proctor Addendum at 2–3, 6. The Court notes:

a. Dr. Proctor did not conduct any additional testing or evaluation of Applicant.

b. Dr. Proctor stood by the opinion he gave at trial under the then-prevailing standards, finding:

> It continues to be my opinion that when considered in light of the diagnostic nomenclature, relevant research, and law in place at the time of my 2010 evaluation/testimony regarding [Applicant], the available evidence did not support a diagnosis of intellectual disability, but rather was consistent with borderline intellectual functioning.

Proctor Addendum, at 2-3.

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[7] The exhibits presented to Dr. Proctor contained two new exhibits, not presented in the first subsequent application: 1) an addendum to Dr. Fletcher's report, dated September 17, 2020, in which he acknowledged his own scoring error on the administration of the Vineland Scales, *see* Second Subsq. Appl. Ex. 7; and 2) an affidavit dated March 22, 2019, from Thomas Hodges, grandfather of Karah Hodges—the victim of Applicant's conviction for solicitation of aggravated sexual assault of a child under the age of fourteen, Second Subsq. Appl. Ex. 12. Mr. Hodges acknowledges Applicant's purported intellectual shortcomings but concludes with the statement, "I think he deserves the death penalty." *Id.*

c. However, "[w]hen considered in light of the current diagnostic nomenclature, relevant research, and law," Dr. Proctor's opinion now "differs" from that given at trial, and that he currently believes Applicant meets the criteria for intellectual disability. Proctor Addendum, at 3.

49. Dr. Proctor's cited the following reasons for changing his opinion:

a. He can no longer rely on the RIAS score of 80 because of current "concerns regarding the test overinflating scores of individuals with low intelligence." Proctor Addendum, at 3; 1 EHRR 43–44.

b. On the SB5, with the two-point scoring error, reduction of the score due to application of the "'Flynn Effect' (i.e., IQ score inflation resulting from outdated test norms)," and the application of the standard error of measurement (SEM) of +/- 5, the IQ of 80 is reduced to one that falls within ID range, thus establishing significantly subaverage intellectual functioning. Proctor Addendum at 3–4; 1 EHRR 44–46.

c. Regarding adaptive deficits, a post-trial change in the DSM now requires a finding of significant adaptive deficits in only one domain as opposed to two domains, as required at the time of trial. *See* 53 RR 203–06; 1 EHRR 26.

d. At trial Dr. Proctor did not view Applicant's functional academic deficits in math-related endeavors as rising to a level of a significant deficit, given his reading and spelling abilities and extraordinarily low level of education. However, under current conceptualization of ID, because lack of

education is a "risk factor" for ID, Dr. Proctor now believes there are "significant deficits in the conceptual domain" under "the current state of the diagnostic nomenclature, research, and law pertaining to intellectual disability." Proctor Addendum, at 5; 1 EHRR 46–48.

e. Dr. Proctor found deficits in *only* the conceptual domain, namely in the area of mathematics. *See* Proctor Addendum, at 5; *see also* 2 EHRR 33–35, 48–50, 52–53, 118, 150–54. But because Applicant's "verbal abilities are clearly not deficient," Dr. Proctor found that "prong two is too close to call." 2 EHRR 163.

f. Dr. Proctor further concluded that Applicant now meets prong three, given his age was within the developmental period at the time of the 2010 interview. 1 EHRR 50.

50. Applicant called Dr. Proctor at the evidentiary hearing to testify to his change of opinion.

51. Dr. Proctor confirmed, he has not re-examined Applicant since his 2010 evaluation. *See* 1 EHRR 98–99, 112.

52. Dr. Proctor stands by his trial opinion that Applicant was *not* ID, under the criteria as it existed in 2010, and considers it a close call today, *see* 1 EHRR 154-55, 163; but now opines, under current diagnostic criteria and caselaw, that Applicant is ID. 1 EHRR 43.

53. Dr. Proctor does not question the validity of Dr. McGarrahan's testing, her credentials, or her ability to conduct IQ testing; he thinks highly of her. 1 EHRR 145. He respects her opinion, considers her qualified and respected in her field, and holds her in high regard. 1 EHRR 56–57.

54. Dr. Proctor agreed that, on Dr. McGarrahan's testing, Applicant showed improvement in executive functioning—namely verbal abilities, spelling, verbal comprehension—but other deficits still existed. 1 EHRR 51–53, 150–54.

55. Dr. Proctor also admitted Applicant likes to read and write and now has time to do it, and, while letters and books were found in Applicant's cell, no math problems were found, and he did not appear to be working on math while in prison. 1 EHRR 107–08.

56. Dr. Proctor disagreed with Dr. McGarrahan's reliance on the General Abilities Index (GAI). According to Dr. Proctor:

a. The GAI should not be used to measure prong one of the ID evaluation. 1 EHRR 66, 73.

b. The DSM-5-TR's current clinical guidelines for diagnosis require an FSIQ score to rule in or rule out prong one of an ID diagnosis. 1 EHRR 15–16, 71–72.

c. In contrast to the FSIQ, the GAI is calculated on the WAIS-IV using fewer indexes—omitting the WMI and PSI in calculating overall

intellectual ability. 1 EHRR 16. For this reason, Dr. Proctor believes reliance on the GAI to diagnose ID is not consistent with current clinical guidance and believes the diagnostic manuals and caselaw focus only on FSIQ for diagnosis. 1 EHRR 16.

d. In his recollection, Dr. Proctor has never seen GAI used in a Texas death penalty trial to rule in or rule out prong one. 1 EHRR 17, 66–68.

e. In his opinion, basing prong one on the GAI is outside the circle of permissible clinical judgment. 1 EHRR 37–39.

57. Dr. Proctor admitted that the DSM-5-TR does not specifically exclude the GAI nor does it mandate the use of a particular IQ test, like the WAIS-IV and FSIQ, for diagnosis. 1 EHRR 71–72.

58. Dr. Proctor admitted the WAIS-IV interpretative manuals provide context in understanding IQ scores and when to consider GAI to understand an intellectual profile, and there are times when GAI is more appropriate than the FSIQ. But, in Dr. Proctor's opinion, not in the context of diagnosis. 1 EHRR 72–73.

59. According to Dr. Proctor, use of the GAI violates the diagnostic criteria of the DSM-5-TR, but not necessarily the rules for administering the WAIS-IV IQ test. 1 EHRR 71–72, 75.

60. Dr. Proctor also disagreed with Dr. McGarrahan's consideration of and rejection of "risk factors" in her analysis, arguing she improperly

considered Applicant's strengths over his weaknesses and did not give proper deference to possible "risk factors" for ID diagnosis—namely his profound lack of education and history of methamphetamine abuse. *See* 1 EHRR 47–53, 117–20, 160–61.

61. Regarding "risk factors," Dr. Proctor explained:

a. A "risk factor" was something that happens during a person's developmental period of life that increases the risk or likelihood of developing ID. 1 EHRR 39.

b. The diagnostic and interpretive manuals are moving away from considering what is causing the adaptive deficit, focusing more on consideration of risk factors as potential causes of ID. 1 EHRR 46–47. The DSM-5-TR removed the requirement that significant deficits in adaptive behavior had to relate back to significant deficits in intellectual functioning. 1 EHRR 12–13.

c. Applicant's profound lack of education and history of methamphetamine abuse are no longer reasons to exclude ID, but ways to understand it. 1 EHRR 46–47. They are instead risk factors that could contribute to someone becoming ID. 1 EHRR 107.

d. Dr. Proctor admitted, one can talk about strengths in the context of adaptive deficits, it's just not appropriate to say, "if a person can do X, then they can't be [ID]." 1 EHRR 26–27.

e. Dr. Proctor admitted, "there are some levels of things you would not expect to ultimately see in someone who is intellectually disabled[.]" 1 EHRR 27.

62. The diagnosis must focus on whether there are significantly subaverage deficits in one of the three domains—conceptual, social, or practical. 1 EHRR 26–27.

63. According to Dr. Proctor, Applicant has a mix of strengths and weaknesses in the conceptual domain—his math ability continues to be extremely low, while his verbal abilities were average at the time of trial and, along with writing, have now improved. But considering his lack of education as a risk factor, Dr. Proctor found conceptual domain deficits. 1 EHRR 48.

64. Dr. Proctor interprets *Moore I* as prohibiting even the medical community from exercising professional judgment in the consideration of risk factors. Because the medical community sees risk factors as potential causes of ID, in his opinion he is foreclosed by *Moore I* from considering them as anything else. *See* 1 EHRR 119, 149.

65. Dr. Proctor did not consider drug-induced brain fog to be a significant factor in his analysis because he had no other point of reference at the time he tested Applicant in 2010. However:

a. Dr. Proctor would have found useful as a point of reference IQ testing from before the age of 16—when Applicant was not using methamphetamine—and a test after the effects had worn off. 1 EHRR 89.

b. Dr. Proctor agreed, testing conducted after Applicant had been denied access to methamphetamine for a period of over ten years would also be beneficial. 1 EHRR 89.

66. Finally, Dr. Proctor believes he must prioritize evidence and testing as it existed during the developmental period in which he examined Applicant in 2010. While recent testing addresses where Applicant is today, Dr. Proctor supports application of "the current diagnostic criteria for where [Applicant] was at that time," when he saw him in 2010. 1 EHRR 48, 92–93.

67. Dr. Proctor's analysis relies on retroactive application of current diagnostic criteria, to his 2010 examination, without considering new evidence that may further explain or put into context the evidence available at the time of his 2010 examination. *See* 1 EHRR 48, 92–93 (finding "there is significantly subaverage conceptual deficits when I saw him [in 2010] based on the current state of things.")

IV. Findings of Fact Related to Dr. McGarrahan's 2021 Examination and 2023 Hearing Testimony.

68. The Court finds that Dr. McGarrahan met with Applicant at TDCJ on September 13 and 14, 2021, and performed a clinical interview, mental

status examination, and intellectual and neuropsychological assessment. 2 EHRR 7–8, 14; EHSX 4.

69. In conjunction with this examination, Dr. McGarrahan performed the following tests on Applicant: WAIS-IV; Wide Range Achievement Test, Fifth edition (WRAT-5); Advanced Clinical Solutions Word Choice Test; Dot Counting Test; Wisconsin Card Sorting Test; Trail Making Test, Parts A and B; Test of General Reasoning Ability; Reynolds Interference Task; Ruff Figural Fluency Test; Vocabulary Assessment Scales—Receptive and Expressive; Advanced Clinical Scales Social Cognition; Verbal Fluency, FAS; Digit Vigilance Test; Conners Continuance Performance Test-3; California Verbal Learning Test, 3rd edition; Rey-Osterrieth Complex Figure Test; and Personality Assessment Inventory. 2 EHRR 23; EHSX 4, at 4.

70. In addition to her own examination, Dr. McGarrahan considered the following evidence: Writings and other correspondence from and to Applicant while incarcerated; Neuropsychological Screening Report by Paul Andrews, Ph.D., dated 1/18/2010; Several volumes of transcripts from Applicant's trial; Unsworn Declaration of Dale G. Watson, Ph.D., dated 1/4/2019; Dale G. Watson, Ph.D. Curriculum Vitae, dated 10/13/2018; Declaration of Jack M. Fletcher, Ph.D., ABPP, dated 1/5/2019; Report of Findings, Conclusions & Opinions by Timothy J. Proctor, Ph.D., ABPP, dated 5/4/2010; Report Addendum by Timothy J. Proctor, Ph.D., ABPP, dated

1/8/2021; Affidavit of Edward B. Gripon, M.D., dated 10/13/2014; TDCJ Office of Inspector General records (Incident #: 2100001018); TDCJ Offender Grievance Forms signed by Applicant; TDCJ Medication Print Pass Report, dated 5/4/2021; TDCJ medical records; St. Luke's Health Memorial (MMC)–Livingston medical records; and Telephone communication and data exchange with Dr. Timothy Proctor on 4/19/2021 and 11/1/2021. *See* 2 EHRR 9; EHSX 4, at 1.

71. Dr. McGarrahan concluded that Applicant did not meet the criteria set out by the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and American Association on Intellectual and Developmental Disabilities (AAIDD) manual for Intellectual Disability. *See* 2 EHRR 25; EHSX 4, at 8–10.

72. The DSM-5 has since been revised, including revisions to the ID diagnosis section. At the hearing, the experts referred to the most current version, the DSM-5-TR. *See* 1 EHRR 12–14; 2 EHRR 73 (referring to copy of DSM-5-TR).

73. In Dr. McGarrahan's report, she concluded that Applicant's IQ scores do not satisfy the intellectual-deficits prong of the ID requirements, and his deficits do not satisfy the adaptive-deficits prong because his "cognitive deficits are not seen as occurring in the context of adaptive deficits associated with intellectual functioning, and his academic achievement scores far exceed

what could be attained by an individual with ID." EHSX 4, at 8–9. And because Applicant did not present with intellectual or adaptive deficits, he also did not satisfy the third prong—onset during the developmental period. *Id.*

74. Dr. McGarrahan's testimony at the evidentiary hearing confirmed her diagnosis and overall conclusion that Applicant does not suffer from ID but may have "a substantial amount of cognitive difficulties," a history of drug abuse, and a learning disability in mathematics. 2 EHRR 25; *see also* EHSX 4, at 9–10.

A. Deficits in intellectual functioning

75. First, Dr. McGarrahan concluded that Applicant did not meet prong one of the DSM-5-TR requirements for ID diagnosis—deficits in intellectual functioning. 2 EHRR 26.

76. Dr. McGarrahan administrated the WAIS-IV and obtained an FSIQ of 80. 2 EHRR 26–27. With the application of the SEM (+ or – 5 points) and the Flynn Effect (+ or – 4.2 points), this presented an IQ range of 70.8 to 80.8. 2 EHRR 44–45, 63–64.

77. The WAIS-IV is comprised of four indexes: Verbal Comprehension Index (VCI) on which Applicant scored 102, Perceptional Reasoning Index (PRI), on which Applicant scored 81, Working Memory Index (WMI), on which he scored 77, and a Processing Speed Index (PSI), on which he scored 68. 2 EHRR 27.

78. Dr. McGarrahan observed "statistically significant differences" between Applicant's index scores on the WAIS-IV. 2 EHRR 35.

79. Dr. McGarrahan described the split in index scores, as seen in Applicant's case, as a very rare occurrence—seen in one percent of the population, and extremely rare in even a clinical population of individuals with ID. 2 EHRR 37–38.

80. Further, Applicant's VCI score showed a "massive—highly unlikely, very rare increase in his verbal skills from prior testing to [Dr. McGarrahan's] testing." 2 EHRR 27–28. Applicant's VCI on Dr. McGarrahan's test was 102 as compared to a 74 on Dr. Andrews's testing, and a 72 on Dr. Proctor's testing. 2 EHRR 29.

81. To Dr. McGarrahan, this increase in the VCI was surprising because:

a. Verbal skills are "innate" and "fairly developed early in life and remain stable over the course of our lives." 2 EHRR 29–31.

b. Verbal skills are a "fairly fixed" baseline. 2 EHRR 30–31.

c. Neuropsychologists rely upon verbal skills as an indicator of cognitive functioning because they are not likely to improve dramatically over time or over one's ability. 2 EHRR 31.

d. Unless there is substantial damage to the left side of the brain, verbal scores "are what neuropsychologists rely upon in looking at premorbid intellectual functioning." 2 EHRR 30.

82. Applicant's writings from TDCJ were consistent with his VCI score. 2 EHRR 19–20, 30.

83. Dr. McGarrahan also administered the Wide Range Achievement Test (WRAT-5), on which Applicant's scores corresponded with the WAIS-IV. 2 EHRR 32.

a. On the WRAT-5, Applicant obtained Standard Scores of 92 on word reading, 100 on reading comprehension, 100 on spelling, and 65 on math. *See* 2 EHRR 31–32; EHSX 4 at 6.

b. These verbal scores correspond with 10th grade and college level grade equivalencies, whereas his math score corresponded with a 2nd grade equivalency. *See* 2 EHRR 31–32; EHSX 4 at 6.

84. Applicant's verbal scores on the WAIS-IV and the WRAT-5 are not typical of a person with ID because of the innate nature of verbal skills; people with ID "often have significantly impaired verbal skills." 2 EHRR 32–33.

85. It is very unusual for someone with ID to have verbal scores this high, and Dr. McGarrahan has not diagnosed anyone as ID with this kind of verbal and academic skills and is unaware of any such diagnosis in professional literature. 2 EHRR 32–33.

86. Dr. McGarrahan attributed this huge jump in scores to Applicant's prolonged use of methamphetamine prior to his arrest, the lingering effects of which likely depressed the scores obtained by Dr.'s Proctor and Andrews but had worn off after his incarceration. 2 EHRR 33–34. She reasoned:

a. Dr. Proctor and Dr. Andrews obtained "flat profiles" at the time of testing—meaning scores were consistent across the various indexes without a lot of "peaks and valleys." *See* 1 EHRR 19–21; 2 EHRR 33–35.

b. Dr. Andrews observed variance in verbal results on the SB5 suggesting—consistent with the present scores—that his verbal skills were always in the average range. 2 EHRR 33–34.

c. Applicant told Dr. McGarrahan that it took some time for his head to clear from the drugs after he was incarcerated, consistent with the difference in his relatively flat scores in 2010 and his elevated scores now. 2 EHRR 34; EHSX 4, at 4.

87. Dr. McGarrahan also considered Applicant's profound lack of education in connection with the elevation in some scores but not others. 2 EHRR 42.

a. Applicant continues to score below average on math, which likely reflects his limited education in that area. *See* 2 EHRR 31–32, 43.

b. Dr. McGarrahan believes Applicant could also have a learning disability in math. 2 EHRR 43–44.

c. Math is not a skill an inmate typically works on or relies upon in an incarcerated environment, unlike reading or writing; thus, math skills are not likely to improve in a prison setting. 2 EHRR 42–43.

88. Given his scores, Dr. McGarrahan believes Applicant always had the capacity to learn. 2 EHRR 34.

89. Given the statistically significant difference between index scores of the WAIS-IV, Dr. McGarrahan looked to the authoritative texts for guidance in interpreting the scores. 2 EHRR 35. Those texts included: *The WAIS-IV Technical and Interpretive Manual* (Technical Manual), *The WAIS-IV Administration and Scoring Manual* (Administration Manual), *The Essentials of WAIS-IV Assessment,* 2nd Edition (Essentials), the DSM-5-TR, and *The WAIS-IV, WMS-IV and ACS Advanced Clinical Interpretation* (Advanced Manual). 2 EHRR 35, 144; EHSX 4, at 6.

90. The WAIS Manuals and the Essentials offer multistep processes to guide clinicians in these rare instances where clinicians obtain statistically significant differences in index scores. 2 EHRR 35–38.

91. Relying on these texts, Dr. McGarrahan determined that Applicant's FSIQ was not to be relied upon as giving a sense of broad intellectual abilities, or "g" because his scores indicated substantial processing speed deficits (PSI) and working memory deficits (WMI)—attention, concentration, and psychomotor speed difficulties. 2 EHRR 35–36.

92. With guidance from the texts, Dr. McGarrahan removed this interference to look at his broad cognitive functioning—the GAI—which resulted in a score of 91. 2 EHRR 35–36.

93. Dr. McGarrahan explained how she used the authorities to interpret this statistically significant differences in the WAIS-IV index scores and arrive at her diagnosis relying on the GAI over the FSIQ:

a. First, from the DSM-5-TR, for diagnosis of ID, "clinical training and judgment are required to interpret test results and assess intellectual performance. Individual cognitive profiles based on neuropsychological testing as well as cross-battery intellectual assessment are more useful for understanding intellectual abilities than a single IQ score." 2 EHRR 136 (citing DSM-5-TR at 38). This section of the DSM-5-TR, in combination with the other texts, indicates that one does not "rely upon one score in a vacuum." 2 EHRR 136. And "[h]ighly discrepant test scores may make an overall IQ score invalid." 2 EHRR 136–37 (citing DSM-5-TR at 38).

b. From the WAIS-IV Technical Manual, Dr. McGarrahan explained that Appendix C on page 167 addresses the multiple steps involved in determining whether the GAI or the FSIQ is the "more valid and reliable measure of global intellectual functioning." 2 EHRR 137–38. "The steps are to determine whether the index discrepancies are statistically significant, and if they are, that's when you make the step then to look at the discrepancies and

determine whether the [FSIQ] is less valid as a measure than the [GAI] which would best capture [global intelligence] by removing those scores that are pulling down his [FSIQ] score." 2 EHRR 138–40. The first step is to determine if the discrepancy is statistically significant; she determined that it was. 2 EHRR 138–40; *see also* 2 EHRR 83–84 (citing Manual at 129, 136).

c. The Technical Manual works hand in hand with the Administration Manual, referring to tables in the Administration Manual to enable this initial determination as to whether the discrepancy is so rare, or statistically significant. 2 EHRR 139–40. The Administrative Manual provides scoring instructions, but also calculations, statistical analysis about how frequent certain index score discrepancies are, which Dr. McGarrahan relied upon before advancing to the next step in determining the appropriateness of FSIQ or GAI. 2 EHRR 140–41.

d. The Technical Manual advises that the "GAI does not replace the [FSIQ] but it should be reported and interpreted along with the [FSIQ,]" 2 EHRR 87–88 (citing Technical Manual at pg. 167), which Dr. McGarrahan did, reporting both scores in her report. 2 EHRR 88–89. The Technical Manual "gives the clinician the ability to use their judgment;" and she did not substitute or omit FSIQ, and she did not "just rely on the GAI. [She] relied on that as a more reliable indicator of his overall intellectual functioning," but she did not discount the FSIQ. 2 EHRR 89–91.

e. The fourth book Dr. McGarrahan relied upon was the Essentials. 2 EHRR 141–42. Specifically:

i. Step 2 reads, in part:

> Two composites are available for the WAIS-IV: The traditional FSIQ and the [GAI] composed only of the subtests that constitute for the VCI and PRI. The GAI which excludes subtests associated with a person's working memory and processing speed has also been used as an alternate measure of global intelligence for the . . . WAIS-IV. The three VCI and three PRI subtests that compose the WAIS-IV GAI are usually the best measures of g, whereas working memory and processing speed subtests are often among the worst measures. Because the GAI is composed of strong measures of general ability, it is especially useful for estimating general ability for individuals whose scores on memory and speed tests deviate significantly from their scores on measures of verbal and nonverbal tasks.

2 EHRR 142–43 (citing Essentials at 156–60).

ii. Dr. McGarrahan next proceeded to Step 2A which provides: "Consider the person's four WAIS-IV indexes. Subtract the lowest index from the highest index. Answer this question: Is the size of the standard score difference less than 1.5 standard deviations (less than 23 points.)" 1 EHRR 79; 2 EHRR 190. Applying Step 2A to Applicant's case, Dr. McGarrahan subtracted the PSI (68) from the VCI (102) for a score of 34. 1 EHRR 80;[8] EHSX

[8] At the hearing, the State relied upon the wrong index in its calculation—the WMI of 77, rather than the PSI of 68. 1 EHRR 80. However, the ultimate result was the same—a score greater than 23.

4, at 6. According to Step 2A, if the answer is yes, then FISQ "may be interpreted as a reliable and valid estimate of a person's Global Intellectual Ability." 1 EHRR 80; 2 EHRR 190-91. But if the answer is "no"—as it was in Applicant's case—"then the variation in the indexes that compose the [FSIQ] is too great. . . . For the purpose of summarizing Global Intellectual Ability in a single score, i.e., the FSIQ, proceed to Step 2B." 1 EHRR 81; 2 EHRR 191.

iii. Step 2B reads: "When FSIQ is not interpretable, determine whether the [GAI] may be used to describe overall intellectual ability." 2 EHRR 192. Step 2B asks, "Is the size of the standard score difference between the VCI and PRI less than. . . 23 points?" 1 EHRR 81; 2 EHRR 192. In Applicant's case, the VCI (102) less the PRI (81) resulted in a score of 21, which is less than 23. *See* EHSX 4, at 6. Step 2B then provides:

> If yes, then the GAI may be calculated and interpreted as a reliable and valid estimate of a person's general intellectual ability. To calculate the GAI and obtain its 90 percent or 95 percent competence intervals, simply sum the scaled scores on the six subtests that compose the GAI (similarities, vocabulary, information, block design, matrix reasoning, individual puzzles) and enter this sum into the appropriate table. *See* Appendix C of the WAIS-IV Technical and Interpretive Manual. After calculating GAI, proceed to Step 3.

1 EHRR 82; 2 EHRR 192.

iv. Step 2B also reads,

> If no, then the variation in the indexes that compose the GAI is considered too great, i.e. greater than 23 points, for the purpose of summarizing general ability in a single score, i.e. GAI. Therefore, neither FSIQ nor GAI is appropriate suggesting the person's global ability cannot be meaningfully conveyed as a single score, proceed to Step 3.

1 EHRR 82; 2 EHRR 194. But because the answer was "yes", Step 2B does not apply to Applicant.

v. By the terms of Step 2A and 2B, followed "in step-wise progression" Dr. McGarrahan determined "the GAI may be calculated and interpreted as reliable while the [FSIQ] could not." 2 EHRR 143.

f. Finally, Dr. McGarrahan relied upon the Advanced Manual, pages 5–7, which supports the theory that the VCI and PRI "are thought to contain the most highly g loaded subtests within the WAIS-IV" and should be used when there is too much discrepancy in the index scores. 2 EHRR 144.

i. The Advanced Manual discourages dropping WMI and PSI *only* if they are too low, 2 EHRR 91–94; but

ii. Dr. McGarrahan did not drop those indexes simply because they were low, 2 EHRR 144–45;

iii. Dr. McGarrahan dropped WMI and PSI because "the differences [in the scores] were so statistically significant that they could not

have occurred by chance and, following those steps, [I] then relied upon the GAI as the more reliable overall IQ score for him." 2 EHRR 145.

94. The authoritative texts indicate that the FSIQ of 80 was not reliable in determining broad intellectual abilities (referred to as "g") because Applicant has substantial processing speed deficits and working memory deficits. 2 EHRR 35–36. The texts advise removing interference from these deficits by referring to the GAI, on which Applicant's score was a 91—or average. 2 EHRR 36.

95. In her expert opinion, under these conditions, the GAI is the more reliable indicator of Applicant's intellectual functioning. This score does not meet the cutoff for prong one of an ID diagnosis. 2 EHRR 44–45; *see* EHSX 4, at 8 (factoring in SEM and Flynn Effect, GAI range outside ID range at 81.8–91.8).

96. Dr. McGarrahan defended her reliance on the GAI;

a. After observing "statistically significant differences" between Applicant's index scores, she sought guidance from the authoritative texts in her field in how to look at the FSIQ. 2 EHRR 35.

b. Relying on her training as a neuropsychologist (which Dr. Proctor is not, *see* 1 EHRR 6–9), and the authoritative texts, she was able to look at factors that may intervene or reduce someone's intellectual number and parcel out what is making up a particular IQ score. 2 EHRR 36–37.

c. The WAIS-IV, its accompanying manuals, Dr. Kaufman's Essentials, and the DSM "are very clear about not relying on [one] score and excluding all other information that might be to the contrary." 2 EHRR 37.

d. Regarding the use of specific terminology like "FSIQ," Dr. McGarrahan explained that the DSM-5-TR and AAIDD are not referring to any specific IQ test or score—like the FSIQ from the WAIS-IV—but address obtaining a "broad intellectual score." 2 EHRR 39.

e. Regardless of what terminology you use, "the goal is to try to figure out what the whole picture of a person's functioning is[.]" 2 EHRR 39.

97. Dr. McGarrahan explained the rare situations in which the GAI might be more reliable than the FSIQ:

a. The WMI and PSI are most sensitive to cognitive or psychomotor issues, and conditions like depression, drug abuse, or motor difficulties—things that don't necessarily involve intelligence—can nevertheless affect concentration, motor speed, or motivation, and pull these scores down; 2 EHRR 39–41.

b. In contrast, VCI is the most innate and solid of the indexes, 2 EHRR 40–41, and less likely to change over time. 2 EHRR 29–30.

c. When this kind of divergence exists between the indexes, removing WMI and PSI prevents those most-sensitive indexes from pulling down the other indexes, and gives a purer sense of intellect. 2 EHRR 41.

98. Dr. McGarrahan asserted that the manuals she relied upon give her guidelines for making these determinations, but also her training and twenty-two years of experience allow her to exercise her clinical judgment in following the manuals' rules. 2 EHRR 41.

99. Dr. McGarrahan's analysis looks at the entire picture to get the most global and accurate result—she does not just rely on one score, or a four-month window of a person's life; rather, she must look at the entire picture through clinical judgment. 2 EHRR 45, 65. Her opinion was not just about a number or one strength—the VCI—but about all the information she had. 2 EHRR 150.

100. In making this determination, Dr. McGarrahan "relied upon the texts that are authoritative in [her] field and the steps that it suggests that you do." 2 EHRR 141. While the FSIQ is usually the preferred score, these were not usual results. 2 EHRR 146.

101. As a clinical neuropsychologist her opinion involves clinical judgment. 2 EHRR 146–47.

102. The DSM-5-TR does not specifically mention "FSIQ," nor does it forbid use of the GAI. *See* DSM-5-TR at 37–45. Rather, it requires "[d]eficits in intellectual functions [must be] confirmed by both clinical assessment and individualized, standardized intelligence testing." *Id.* at 37. "Intellectual functioning is typically measured with individually administered and

psychometrically valid, comprehensive, and culturally appropriate tests of intelligence." *Id.* at 38. Further, "[c]linical training and judgment are required to interpret test results and assess intellectual performance." *Id.*

103. In Applicant's case, the GAI was 91, which was average, and not close to the cutoff for finding ID under for prong one—even with the application of Flynn Effect and SEM. His FSIQ was 80, which is low average, but approaches the cutoff with application of the Flynn Effect and SEM. 2 EHRR 44–45.

B. Adaptive Deficits

104. Dr. McGarrahan concluded that Applicant also did not meet prong two of the ID diagnosis—adaptive deficits. 2 EHRR 49.

105. In Dr. McGarrahan's opinion, when tested prior to trial, Applicant's depressed cognitive functioning was the result of the lingering effects of his drug usage and being in custody. 2 EHRR 49.

106. Dr. McGarrahan believes Applicant's true adaptive abilities were shown in the neurocognitive testing she did with respect to his academic skills, verbal skills, and memory skills, 2 EHRR 49; which showed "massive" and "unlikely" improvement, *see* 2 EHRR 27–28; and which are "innate" and "fairly developed early in life and remain stable over the course of our lives." 2 EHRR 29–31.

107. Applicant does have deficits in processing speed and executive functioning. 2 EHRR 50.

108. Applicant performed poorly on tests involving abstract reasoning and nonverbal problem solving, which could be the result of a neurocognitive disorder or injury but, looking at the entire picture, this was not a sign of intelligence. *See* 2 EHRR 45–48.

109. It would be extremely rare for someone with ID to be capable of the level of improvement Applicant has shown in the other indexes. 2 EHRR 50.

110. While Dr. Proctor found deficits in the conceptual domain because of Applicant's math deficits, 1 EHRR 46–48; Proctor Addendum at 4–5, Dr. McGarrahan explained that math skills fall within the same domain as verbal comprehension skills where Applicant showed such improvements, 2 EHRR 50–51. For this reason, Dr. McGarrahan concluded that his deficits in math skills alone where not sufficient to sustain a finding that he meets the standards for prong two. 2 EHRR 51.

111. Regarding risk factors, Dr. McGarrahan does not believe she *must* conclude Applicant is ID if risk factors exist.

112. The DSM-5-TR does not mandate that the existence of a risk factor *requires* ID diagnosis. The DSM-5-TR specifically provides for the exercise of clinical judgment. *See* DSM-5-TR at 38 ("Clinical training and judgment are

required to interpret test results and assess intellectual performance."); *id.* at 42 ("[C]linical judgment is important in interpreting the results of IQ tests[.]"); *id.* at 42 ("Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. . . . Scores from standardized measures and interview sources must be interpreted using clinical judgment.").

113. Dr. McGarrahan considered Applicant's risk factors in her analysis; namely, she considered Applicant's lack of education:

a. In her twenty-two years of practice, Dr. McGarrahan could not recall anyone with so profound a lack of education as Applicant. 2 EHRR 17.

b. Dr. McGarrahan agreed that this lack of education is a risk factor for ID but must be taken into account when looking at Applicant's performance and test scores. 2 EHRR 17.

c. It is "important to have an understanding of how much education an individual received in order to do a thorough interpretation of the cognitive testing." 2 EHRR 16.

d. "[E]xpectations for cognitive test results will differ depending on someone's level of education." 2 EHRR 16.

e. And the test-takers results must be normed and compared with norm-referenced peers of the same general age and education. 2 EHRR 17–18.

see also 2 EHRR 33 (Applicant's verbal skills scores were "dramatically different" from normative information in manuals).

114. Dr. McGarrahan also considered Applicant's history of substance abuse prior to trial—another risk factor—in her analysis.

a. Applicant recounted that he began drinking and using drugs around age 12, he drank substantially until age 15, when he started using methamphetamine, intravenously on a regular and heavy basis until he was arrested. 2 EHRR 20.

b. Dr. McGarrahan found significant Applicant's self-report to her that "he continued even after his arrest to suffer the consequences and the intoxicating effects from methamphetamine for quite some time while he was in custody," 2 EHRR 21; and that Applicant "indicated that his thinking was so much clearer" when she examined him years later, and "that it took a substantial amount of time, up to a couple of years, which is consistent with what the research shows about methamphetamine use, in order for his brain to . . . clear the fog, to clear the effects of the methamphetamine and that he felt so much clearer-headed and able to focus and concentrate" when she saw him. 2 EHRR 21.

c. Dr. McGarrahan testified that, as a neuropsychologist, Applicant's experience was consistent with her understanding of the effects from prolonged

use of drugs like methamphetamine and informed her opinions and diagnosis. 2 EHRR 21–22.

d. As a neuropsychologist, Dr. McGarrahan considers the effects on the brain of drug usage, determining the severity and extent of damage to the brain, looking at patterns of cognitive performance to help determine what is contributing to the scores she is seeing. 2 EHRR 21–22.

e. Applicant's prior drug usage and lingering effects may have suppressed his original IQ scores, while explaining the later jump in scores. *See* 2 EHRR 21–22, 33–34.

115. Dr. McGarrahan included Applicant's drug history and lingering effects in the background information section of her report indicating it was a noteworthy admission by Applicant. *See* EHSX 4, at 3–4.

116. Applicant's drug usage was thoroughly documented at trial through testimony from Dr. Proctor, *see* 55 RR 165–66, 257–59, and defense witnesses Dr. Patricia Rosen, *see* 52 RR 23–25 (Medical toxicologist testified toxicology reports from Applicant's blood screen at time of arrest showed levels of methamphetamine almost ten times higher than a clinical dose); and Pharmacologist Dr. Paula Lundberg-Love, *see* 53 RR 53–79 (explaining effects of methamphetamine on the brain).

117. A lack of education and drug usage offer an explanation for divergency in results and must be considered in totality. 2 EHRR 52.

118. Dr. McGarrahan found no deficits in any of the three adaptive deficit domains, but specifically found no deficits in the conceptual domain. 2 EHRR 49–51. Dr. McGarrahan did not reference the practical or social domains "by title" in her report, 2 EHRR 111, but found no deficiency in any domain.

C. Onset in developmental period

119. Dr. McGarrahan testified that Applicant's cognitive testing indicates that he had the capacity prior to her evaluation such that it would have existed in the developmental period. 2 EHRR 52.

120. That capacity and the improvement he now shows are inconsistent with ID. 2 EHRR 52.

121. Dr. McGarrahan refers to the four-month period in which Dr.'s Proctor and Andrews evaluated Applicant in 2010, as only a "snapshot" of Applicant's life. 2 EHRR 10-12.

122. In another examination in which Dr. McGarrahan could not rule out an ID diagnosis for another death row inmate, Dr. McGarrahan considered information spanning the inmate's entire lifetime, including the most-recent testing performed by Dr. McGarrahan. 2 EHRR 148–49.

123. The DSM-5-TR anticipates that ID is a "generally lifelong" disorder, DSM-5-TR at 43–44, such that consideration of evidence need not be limited to the developmental period, *see* DSM-5-TR, at 43 ("All criteria

(including Criterion C) must be fulfilled by history or *current presentation.*") (emphasis added).

124. The DSM-5-TR suggests "severity levels may change over time. . . . Early and ongoing interventions may improve adaptive functioning throughout childhood and adulthood. In some cases, these result in significant improvement of intellectual functioning, such that the diagnosis of intellectual developmental disorder is no longer appropriate." 1 EHRR 93–96 (citing DSM-5-TR at 43–44). However:

a. No evidence suggests that Applicant received "early and ongoing interventions . . . through childhood and adulthood." Rather, he was placed in prison where he stopped using drugs and began reading and writing.

b. Dr. McGarrahan considered but rejected the possibility that the rise in Applicant's index scores could be the kind anticipated by the DSM-5-TR. EHSX 4, at 9 ("While it is recognized and understood that individuals with [ID] can learn and make gains in academic or other skills, even sometimes significantly so, the grade levels obtained by [Applicant] are dramatically outside of parameters seen in individuals with ID.").

c. Dr. McGarrahan rejected the notion that mere "guidance, instruction, and enriching environments" are all that is needed to rise out of ID. EHSX 4, at 9.

V. Findings of Fact Related to Dr. Kaufman's Rebuttal Testimony

125. As a rebuttal witness, Applicant called Dr. Alan Kaufman, author of *The Essentials of WAIS-IV Assessment* (2nd ed.) (Essentials)—one of several interpretive manuals relied upon by Dr. McGarrahan in her assessment—to accuse Dr. McGarrahan of inaccurately applying his methodology.

126. Dr. Kaufman accused Dr. McGarrahan of misapplying his methodology in two ways:

a. By using his methodology to rule in or rule out prong one, he contends she ignored the Caution Box entitled "Exception to the Rule Regarding Interpretation of [FSIQ] and GAI." 2 EHRR 182 (citing Essentials at 162), 184–85; and

b. by relying on the GAI in this case, she "ignore[ed] one of the basic principles of the whole intelligent testing approach that I have advocated for a half century: Don't use test scores to hurt somebody." 2 EHRR 185.

127. Dr. Kaufman testified that "research" and "literature" on the subject indicate that variability in the index scores does not render the FSIQ uninterpretable, and such literature indicates that "scatter" or variability among the indexes has little effect on validity or reliability of the scores. 2 EHRR 179. Thus, the research does not support the notion that index variability makes the FSIQ uninterpretable for ID diagnosis. 2 EHRR 179.

128. Because the GAI excludes aspects of intelligence that are included in FSIQ, in Dr. Kaufman's opinion, the GAI is in effect a "short form" test, not a comprehensive test as required by the DSM and AAIDD, which thus renders it inappropriate for ID diagnosis. 2 EHRR 180-81. Where diagnostic criteria of the DSM or AAIDD call for a comprehensive measure, FSIQ should be used. 2 EHRR 183-84.

129. Dr. Kaufman admits the GAI is not listed as a "short form" test in any authoritative guidelines—this is only his opinion. 2 EHRR 181.

130. On cross examination, the State walked Dr. Kaufman through the steps of his book, as applied by Dr. McGarrahan. His testimony provides:

a. Under Step 2, "two composites are available for the WAIS-IV: the traditional FISQ and [GAI]." 2 EHRR 187 (Essentials, at 156).

b. The Essentials provides, "the GAI has also been used as an alternate measure of global intelligence[.]" 2 EHRR 187.

c. "The three VCI and three PRI subtests that compose the WAIS-IV and GAI are usually the best measures of ['g' meaning general intelligence or general ability, 1 EHRR 77–78; 2 EHRR 188] whereas the working memory and processing speed subtests are often among the worst measures." 2 EHRR 188 (Essentials, at 158).

d. The Essentials states: "Because the GAI is composed of strong measures of general ability, it is especially useful for estimating general ability

for individuals whose scores on memory and speed subtests deviates significantly from their scores on measures of overall verbal and nonverbal tasks." But Dr. Kaufman focused on the word "estimating" as the most important word—as in estimating FSIQ, 2 EHRR 188-89, although "FSIQ" is not specifically mentioned.

e. Step 2A requires subtracting the lowest index from the highest index, and Dr. Kaufman confirmed, according to Step 2A, if the answer is yes, then FISQ "may be interpreted as a reliable and valid estimate of a person's global intellectual ability." 2 EHRR 190-91.

f. Dr. Kaufman confirmed, if the answer to Step 2A is "no," as it is in Applicant's case, "then the variation in the indexes is too great . . . for the purpose of summarizing global intellectual ability in a single score, i.e., the FSIQ, proceed to Step 2B." 2 EHRR 191.

g. Dr. Kaufman agreed that under Step 2A, the subtraction of the lowest index from the highest, amounted to "empirical criteria," which he defined as "typically taking between scores, looking at that difference, and seeing if it is large enough to be meaningful." 2 EHRR 189. Dr. Kaufman emphatically distinguished "meaningful" from "statistically significant." 2 EHRR 189-90; *see* 2 EHRR 138–40 (discussion of "statistically significant" in Technical Manual).

h. The tester moves to Step 2B in the Essentials if he or she determines in Step 2A that the variation in the indexes is too great. 2 EHRR 190–91.

i. Step 2B provides that "the GAI may be calculated and interpreted as a reliable and valid estimate of a person's general intellectual ability" when FISQ is not interpretable, and the difference between the VCI and PRI is less than 23 points. 2 EHRR 192.

j. The difference between the VCI and PRI was less than 23 points in Applicant's case. 2 EHRR 192.

k. While the language of Step 2B specifically provides that Applicant's GAI "may be calculated as a reliable and valid estimate" of general intellectual ability, Dr. Kaufman nevertheless insisted Dr. McGarrahan erred because the text does not permit the use of the score for *diagnosis*, 2 EHRR 192–93, a distinction not made anywhere in the text of Step 2B.

131. Dr. Kaufman admitted these statistical rules must be interpreted by a carefully trained examiner who does not rely specifically on numbers—a "clinician's decision," as suggested by the State, which Dr. Kaufman is not. 2 EHRR 193–94.

132. When asked to reconcile language in the first sentence of Step 2B reading, in part, "when FSIQ is not interpretable," with his current testimony suggesting FSIQ is *never* uninterpretable, *see* 2 EHRR 179, 191, Dr. Kaufman

admitted that "it was a poor choice of words," but maintains the Caution Box should have made it clear when *not* to follow these rules. 2 EHRR 191.

133. Dr. Kaufman suggested "nonintepretable" should have been in quotes, although it was not. 2 EHRR 192.

134. Dr. Kaufman repeatedly referred to the Caution Box which deals with this issue of interpretation. 2 EHRR 192. The Caution Box reads:

> Always interpret a person's overall score on the WAIS-IV whenever a global score is essential for diagnosis [e.g., of ID] or placement [e.g., in a gifted and talented program]. Even if both the FSIQ and GAI are noninterpretable based on our empirical criteria, select the one that provides the most sensible overview of the examinee's intelligence for use in the diagnostic or placement process. Use clinical judgment to make this decision. For example, if the examinee was impulsive or distractible when administering the working memory and/or the processing speed subtests, then select the GAI which excludes the WMI and the PSI.

2 EHRR 194-97; *see also* 1 EHRR 84-85 (Essential at 162).

135. According to Dr. Kaufman, the Caution Box should have been read to prohibit the use of GAI for diagnosis because:

a. the Caution Box directs the examiner to, not just pick a score, but to "use the score that is needed to make a diagnosis in whatever circumstance you are in." 2 EHRR 195.

b. Where "scatter doesn't matter" there is no justification for choosing the GAI over the FSIQ. 2 EHRR 195.

c. Despite Step 2B, providing that "the GAI may be calculated and interpreted as a reliable and valid estimate of a person's general intellectual ability" when FISQ is not interpretable, 2 EHRR 192, Dr. Kaufman maintained that because "scatter doesn't matter," the GAI is never appropriate for diagnostic decisions, and his methodology has thus not been followed in this case. 2 EHRR 196–97.

136. When confronted with the words of the Caution Box—"Even if both the FSIQ and GAI are noninterpretable based on our empirical criteria, select the one that provides the most sensible overview of the examinee's intelligence for use in the diagnostic or placement process." 2 EHRR 195–98—Dr. Kaufman ultimately stated, "You can focus on the word empirical if you want, but the focus there is the most sensible and *in capital punishment cases*, in diagnostics of intellectual disability, nationwide, the most sensible score is the [FSIQ] and that is the process. That is the score." 2 EHRR 198 (emphasis added).

137. Dr. Kaufman submitted a declaration prior to the hearing, in which he indicated that GAI may still be used if there is "a valid clinical reason for using the GAI." EHDX 4, at 6. While citing a few examples of "valid clinical reasons," Dr. Kaufman could not direct the State to any exhaustive list of reasons. 2 EHRR 198–200.

138. To support his argument that "scatter doesn't matter," *see* 2 EHRR 179 (citing "research" suggesting "scatter" or variability in indexes has little

effect on reliability of scores), Dr. Kaufman relied on an article by Mark Daniel, published in 2007, 2 EHRR 200–01; EHDX 4, at 6–7, 9.

a. This article was published in 2007,

b. Dr. Kaufman admitted he was unaware of this article when he wrote the Essentials, which was published in 2013, and the Essentials does not contain this information. 2 EHRR 202.

c. Dr. Kaufman changed his methodology in 2016 when he published *Intelligent Testing with the WISC-V Children and Adolescents*. 2 EHRR 202.

d. Dr. Kaufman claimed he was wrong in 2013. 2 EHRR 202.

e. Dr. Kaufman did *not,* however, file a new edition of Essentials updating his methodology. 2 EHRR 203.

f. The Essentials is still widely available, ten years later, and Dr. Kaufman has never corrected any perceived error or issued any updated materials for the manual. 2 EHRR 203.

139. Dr. Kaufman blamed Dr. McGarrahan for not discerning the purported error in the Essentials because:

a. he published a book in 2016, regarding the administration of testing to children, in which he updated his methodology, 2 EHRR 202–04;

b. Dr. McGarrahan should have considered "the datedness of his book and looked to see has anything changed," 2 EHRR 202–04.

140. Dr. Kaufman accused Dr. McGarrahan of "ignoring one of the basic principles of the whole intelligent testing approach that I have advocated for a half century: Don't use test scores to hurt somebody. And in my opinion, when we are talking, in this case, life and death, it's violating the basic intent of my entire testing philosophy and of Dr. Wechsler's entire testing philosophy." 2 EHRR 185, 204–05.

141. Dr. Kaufman showed bias against the death penalty with his testimony that test score should not be used to hurt someone. 2 EHRR 185, 204–05; *see also* 2 EHRR 198 ("You can focus on the word empirical if you want, but the focus there is the most sensible and *in capital punishment cases,* in diagnostics of intellectual disability, nationwide, the most sensible score is the [FSIQ,]").

VI. Credibility Determinations Regarding Expert Witnesses.

142. The Court makes the following credibility determinations:

143. Of the three testifying experts, based on her credentials and expertise, Dr. McGarrahan is best qualified to render an opinion on Applicant's intellectual status.

a. Both Dr. McGarrahan and Dr. Proctor are Ph.D. level psychologists, licensed to practice in Texas and to diagnose ID. *See* 1 EHRR 7–8; 2 EHRR 6.

b. Dr. McGarrahan is also a clinical psychologist—someone who studies significant mental health conditions and can administer and interpret tests, 2 EHRR 6; and has a master's degree in psychology with a specialization in neuropsychology—a subspecialty of psychology that deals with brain and behavior relationships. 2 EHRR 5–6. Dr. McGarrahan has over twenty-two years of experience in her field. *See* 2 EHRR 17.

c. Dr. Proctor is not a neuropsychologist. 1 EHRR 6–9.

d. Dr. Kaufman is not licensed in Texas or any state. 2 EHRR 185–86. He is an "academic psychologist," "who does research, who trains others in their areas of expertise, who writes books to teach people in the field about the areas of expertise." 2 EHRR 186; *see also* 2 EHRR 166–70. Dr. Kaufman is not a licensed clinician. 2 EHRR 187. He is not allowed to diagnose in a clinical setting. 2 EHRR 193.

144. Dr. Kaufman's testimony repeatedly showed bias against the use of intelligence testing in the imposition of the death penalty:

a. Dr. Kaufman accused Dr. McGarrahan of "ignoring one of the basic principles of the whole intelligent testing approach that I have advocated for a half century: Don't use test scores to hurt somebody. And in my opinion, when we are talking, in this case, life and death, it's violating the basic intent of my entire testing philosophy and of Dr. Wechsler's entire testing philosophy." 2 EHRR 185.

b. "You can focus on the word empirical if you want, but the focus there is the most sensible and *in capital punishment cases*, in diagnostics of intellectual disability, nationwide, the most sensible score is the [FSIQ] and that is the process. That is the score." 2 EHRR 198 (emphasis added).

c. Dr. Kaufman confirmed on cross-examination his prior statements that test scores should not be used to hurt someone. 2 EHRR 204–05.

d. Dr. Kaufman's "[d]on't use test scores to hurt somebody" philosophy suggests a bias *against* a certain result—the death penalty—rather than a desire to seek an accurate result.

145. In contrast, Dr. McGarrahan does her testing in a "standardized" manner:

a. Her process of reaching diagnosis is the same, regardless of whether the result is getting services for an individual with disability, or in preparation for a trial, 2 EHRR 47–49;

b. her process for administration, scoring, interpretation, and diagnosis is the same regardless of the severity of the situation, 2 EHRR 49; and

c. regardless of the case, she reaches her conclusion the same way: "by look[ing] at the entire picture rather than just a number or two numbers or three numbers or five numbers." *See* 2 EHRR 147–50; *see also* 2 EHRR 45, 114–17.

d. Dr. McGarrahan has employed her "entire picture" approach in another death-row inmate's case, as the State's hired expert, to conclude she could not rule out ID. *See* 2 EHRR 114–17, 147–50.

e. Dr. McGarrahan has testified for both the State and the defense. 2 EHRR 147–48.

146. Dr. McGarrahan's unbiased expert opinion, utilizing a standardized process in every situation, that looks at the entire picture rather than just a number, is more credible that Dr. Kaufman's who advocates for a score that causes the least harm.

147. Dr. McGarrahan's consideration of the "entire picture" provides a more credible opinion that Dr. Proctor, who confined his analysis primarily to the evidence pertaining to the developmental period of Applicant's life, at the time of the 2010 examination and trial, 1 EHRR 48, 50, 92–93, 97–101, 159–60 and, after *Moore I,* refused to consider a risk factor as anything other than a sign of ID, *see* 1 EHRR 46–53, 107, 117–20, 148–49, 160–61.

148. Dr. Proctor retroactively changed his 2010 opinion without any reexamination of Applicant. 1 EHRR 87–88. He changed his opinion despite concerns about many of the tests he relied upon in 2010:

a. In 2020, Dr. Proctor learned of a scoring error in the 2010 SB5, dropping the score of 80 down to 78;

b. Dr. Proctor also believed Applicant should have scored higher on the second administration of the WAIS-IV, 1 EHRR 59–62;

c. Applicant should have, but did not, score higher on the WAIS-IV than the SB5, 1 EHRR 66;

d. Dr. Proctor administered and relied upon two tests in 2010 that he no longer considers reliable in this context—the RIAS and the Green Word Memory Effort Scale, *see* 1 EHRR 62–63;

e. At the time of the 2010 testing, Dr. Proctor was concerned about background noise impacting Applicant's performance, 1 EHRR 64–65; and

f. Dr. Proctor admits we now "have better research about ways and which tests to use." 1 EHRR 92; *see also* 1 EHRR 63–64, 66.

149. Further, Dr. Proctor retroactively changed his opinion without conducting additional testing, despite knowing that Applicant had been addicted to methamphetamine, was likely still suffering the effects of that addiction at the time of the 2010 testing, and admitting that he did not have sufficient evidence on which to base the impact of methamphetamine on Applicant's functioning in 2010. *See* 1 EHRR 89.

150. Dr. Proctor changed his opinion despite admitting test results obtained *after* the effects of the drugs had worn off—like the testing Dr. McGarrahan performed—would be beneficial to his analysis. *See* 1 EHRR 88–89.

151. Dr. McGarrahan is the only expert to evaluate, test, and apply clinical judgment to Applicant's intellectual status in over ten years, and to consider all evidence from trial until present.

152. Dr. McGarrahan's testing provided a more comprehensive picture of Applicant's intellectual status than just the "snapshot" of the four-month period in which Applicant was evaluated prior to trial. 2 EHRR 10–12.

153. Dr. McGarrahan's most recent evaluation, her expertise and professional judgment outweigh Dr. Proctor's retroactive application of new standards to the four month "snapshot" of Applicant's life at the time of trial.

154. Dr. McGarrahan's analysis and reliance on the GAI, based upon her own expert examination, utilization of professional resources and literature to interpret results, and reliance on her over-twenty years of expertise, is credible.

155. Dr. Kaufman's attempts to sabotage Dr. McGarrahan's credibility based upon her application of his methodology are unsupported.

a. Dr. Kaufman's testimony on cross-examination by the State demonstrates that Dr. McGarrahan accurately followed and applied the steps set out in Essentials for determining whether FSIQ or GAI should be relied upon.

b. Despite the fact that Dr. Kaufman's expertise as "arguably the most prominent scholar on intelligence testing and interpretation of the

various Wechsler IQ tests," EHDX 4, at 3, is "relied on internationally by thousands and thousands of licensed psychologists," 2 EHRR 194 (Kaufman calling himself "a person who has written books that have been relied on internationally by thousands and thousands of licensed psychologists."), Dr. Kaufman blamed Dr. McGarrahan for relying on his expertise and not discerning on her own errors in his book.

i. Dr. Kaufman acknowledged that he was unaware of a 2007 article by Mark Daniel, published six years prior to the Essentials, addressing the issue of "scatter" among the WAIS-IV indexes. 2 EHRR 200–01; EHDX 4, at 6–7, 9. Although he now claims this article demonstrates an error in the Essentials, he has done nothing to correct the book, which is still widely available and for sale. *See* 2 EHRR 202.

ii. Dr. Kaufman changed his methodology in 2016 when he published *Intelligent Testing with the WISC-V Children and Adolescents*, but did not update the Essentials. 2 EHRR 202.

iii. Dr. Kaufman suggested Dr. McGarrahan should have been aware of his 2016 book regarding the administration of testing to children and adolescents, despite the fact that her practice does not involve examining children. *See* 2 EHRR 202–04; *see also* EHSX 2 (McGarrahan's CV).

iv. Dr. Kaufman testified that Dr. McGarrahan should have "considered the datedness of his book and looked to see has anything changed," 2 EHRR 202–04, even though he himself has not updated the book.

v. Dr. Kaufman has published nothing—apart from a separate manual on the administration of testing to children—in the past ten years as notice to the community of professionals relying on his expertise, of the errors in his published methodology.

c. Dr. McGarrahan relied upon Dr. Kaufman's expertise, but did not rely solely on his book. 2 EHRR 204; *see* 2 EHRR 143.

d. No other author of any other text relied upon by Dr. McGarrahan was called to challenge her reliance on their book or question her credibility.

e. As discussed above, Dr. Kaufman is biased against the use of his methodology to impose the death penalty.

156. Despite Applicant's efforts to discredit Dr. McGarrahan through uncalled expert witnesses, the Court finds her evidentiary hearing testimony and report more credible.

a. The State did not oppose the calling of "any other expert witness previously proffered by Applicant in support of his successive habeas application," during the evidentiary hearing. *See* State's Amended Answer to Subsequent Application For Post-Conviction Writ of Habeas Corpus, at 73.

b. Dr. Fletcher was listed as one of Applicant's witnesses on his pre-hearing witness list, *see* Notice of Mr. Milam's Witness List of Evidentiary Hearing (May 19, 2023), and was present in the courtroom at the hearing, but did not testify.

c. Applicant has previously proffered declarations and reports of Dr. Edward Gripon, but he was not called as a witness at either the trial or the evidentiary hearing. *See* 2 EHRR 107–09.

d. Dr. McGarrahan did not consider Dr. Gripon's pre-trial report in connection with her opinion, 2 EHRR 107–08, but did consider Dr. Gripon's 2013 affidavit. 2 EHRR 107–09.

e. Dr. McGarrahan also considered Dr. Mark Cunningham's trial testimony that relied heavily upon Dr. Gripon's pre-trial report. 2 EHRR 105–08; EHSX 4, at 1, 3; *see also* 53 RR 207–08, 211, 215, 217, 219, 233, 244; 54 RR 224; 55 RR 207, 235; *see also* State's Ex. F at 969, ¶236 (upholding jury's credibility determination against Dr. Cunningham and reliance on Dr. Gripon).

f. Dr. Gripon did not find deficits in the Social or Practical Domains in his report—he suggested deficits in writing and mathematics. *See Ex parte Milam,* No. 79,322-03, Subsequent Application for Post-Conviction Writ of Habeas Corpus, Exhibit 6, at 14.

g. After hearing portions of Dr. Gripon's trial report during the hearing, Dr. McGarrahan did not say that it would have would have changed her opinion now. *See* 2 EHRR 108.

157. This Court has already found Dr. Fletcher's assessment on adaptive behavior lacking in credibility, *see* State's Ex. F at 968, ¶235, and now concludes this finding remains unchallenged.

158. This Court also previously upheld the jury's credibility determination against Dr. Cunningham and reliance on Dr. Gripon. *See* State's Ex. F at 969, ¶236. This finding also remains unchallenged.

159. The Court finds, because Applicant did not call these experts, the Court's prior credibility determinations stand, and do not undermine Dr. McGarrahan's opinions or testimony.

CONCLUSIONS OF LAW

160. This Court incorporates by reference the relevant Proposed Findings of Fact and Conclusions of Law—signed by the trial court on October 16, 2019, and adopted by the CCA on July 1, 2020. *Ex parte Milam*, No. WR-79,322-02, 2020 WL 3635921, at *1—that were uncontested by the evidence submitted in support of Applicant's second subsequent habeas application and the ensuing evidentiary hearing. *See* State's Ex. F (FFCL) at 909–34, ¶¶81–137; at 945–46, ¶¶166–69; at 949–69, ¶¶178–82, 184–238, 239 (portion concluding ID claim should be denied on merits).

161. The Court concludes that Applicant has failed to demonstrate by clear and convincing evidence that, but for a constitutional violation, no rational juror would have answered the intellectual disability special issue in favor of death. *See* Article 11.071 § 5(a)(3); *see also Ex parte Woods,* 296 S.W.3d 587, 606 (Tex. Crim. App. 2009) ("The issue then is whether, considering the prior evidence and findings, [A]pplicant's additional evidence reasonably shows, by clear and convincing evidence, that no rational finder of fact would fail to find that he is [intellectually disabled]."); *Ex parte Blue,* 230 S.W.3d 151, 162–63 (Tex. Crim. App. 2007).

162. To demonstrate that he is intellectually disabled and thus ineligible for execution, Applicant must show that he has (A) deficits in intellectual functioning; (B) deficits in adaptive functioning; and (C) the onset of these intellectual and adaptive deficits occurred during childhood or adolescence—the developmental period. *Petetan v. State,* 622 S.W.3d 321, 333 (Tex. Crim. App. 2021); *see also* DSM-5-TR at 37–38; *Moore I,* 581 U.S. at 7.

163. The Court concludes that the jury's negative answer to the intellectual disability special issue in Applicant's trial carries weight in this successive analysis, and remains valid. *See Ex parte Woods,* 296 S.W.3d at 605-06 (where applicant filed successive application presenting same *Atkins* claim previously rejected on the merits by the same court, but relying on additional new evidence, CCA held "prior evidence and findings are relevant to a

determination of whether applicant's current pleading meets the requirements of Article 11.071, § 5(a)(3)[.]")

164. The Court concludes that the Applicant fails to meet the three prongs necessary to establish he is intellectually disabled. *See Petetan*, 622 S.W.3d at 333; *see also* DSM-5-TR at 37–38.

165. The Court concludes that Applicant fails to demonstrate that he has deficits in intellectual functioning:

a. The Court concludes that Dr. McGarrahan's decision to rely on the WAIS-IV GAI instead of the FSIQ, in this specific case, is supported by the professional literature and the evidence, and is the more reliable indicator of Applicant's intellectual functioning than the FSIQ. *See* 2 EHRR 35–45.

b. The Court concludes that the technical and interpretive manuals relied upon by Dr. McGarrahan recognize and support the potential use of the GAI when, like in this case, a substantial discrepancy in indexes exists, *see* 2 EHRR 137–41 (Technical Manual and Administration Manual), 142–43, 191–92 (Essentials), 144–45 (Advanced Manual); and recognize that the GAI may be the most "reliable and valid" estimate of a person's "general" or "true intelligence." *See* 1 EHRR 77–78, 81–82; 2 EHRR 192. Further, the DSM-5-TR does not specifically forbid reliance on the GAI for diagnosis. *See* DSM-5-TR at 37–45 (generally); *id.* at 37 (Requiring that "[d]eficits in intellectual functions [must be] confirmed by both clinical assessment and individualized,

standardized intelligence testing."); *id.* at 38 ("Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, and culturally appropriate tests of intelligence.") The Court concludes that Dr. McGarrahan did not err in relying on these resources to conclude that the GAI was the most reliable indicator of Applicant's general intellectual ability.

c. Relying on the authoritative texts, the Court concludes that the FSIQ of 80 was not reliable in determining broad intellectual abilities (referred to as "g") because Applicant has substantial processing speed deficits and working memory deficits. 2 EHRR 35–36. The texts advise removing interference from these deficits by referring to the GAI, on which Applicant's score was a 91—or average. 2 EHRR 36. Under these conditions, the GAI is the more reliable indicator of Applicant's intellectual functioning.

d. The Court concludes that the GAI score of 91 puts Applicant in the "average" range, 2 EHRR 36, 42; and, even factoring in the SEM and Flynn Effect, does not come close to the cutoff for meeting prong one of an ID diagnosis, 2 EHRR 44–45; *see* EHSX 4, at 8 (factoring in SEM and Flynn Effect, GAI range outside ID range at 81.8–91.8).

e. The Court concludes that the manuals provide for the exercise of clinical judgment in reaching the ultimate decision. *See* 1 EHRR 85–86 ("Even if both the FSIQ and GAI are noninterpretable based on our empirical criteria,

select the one that provides the most sensible overview of the examinee's intelligence for use in the diagnostic or placement process. Use clinical judgment to make this decision."); 2 EHRR 136–37 (DSM-5-TR at 37–38).

f. The Court concludes that Dr. Proctor's and Dr. Kaufman's refusal to consider the GAI for diagnostic purposes, in these circumstances, 1 EHRR 70–87; 2 EHRR 192–93, is unsupported.

g. The Court concludes that only Dr. McGarrahan relied upon personal evaluation, the steps contained within the diagnostic and technical manuals, her twenty-two years of clinical judgment as a neuropsychologist, and "the entire picture" of Applicant's intellectual history to arrive at the most accurate reflection of Applicant's broad intellectual ability. Therefore, Dr. McGarrhan's opinion is more accurate and reliable.

166. The Court concludes that Applicant fails to demonstrate deficits in adaptive functioning:

a. Dr. McGarrahan found Applicant did not meet the criteria for adaptive deficits. *See* 2 EHRR 49–51.

b. The Court agrees with Dr. McGarrahan's testimony that Applicant's adaptive abilities were shown in the neurocognitive testing she performed: he showed significant improvement in academic skills, verbal skills, and memory skills—improvements that would be extremely rare for someone with ID. Given these improvements shown in Applicant's verbal

comprehension skills (VCI index), his math deficits—which coexist within the same conceptual domain—are not sufficient to meet the standards for demonstrating the second prong of the ID requirements. *See* 2 EHRR 49–51.

c. The Court concludes that Dr. McGarrahan's testimony outweighs Dr. Proctor's conclusion that Applicant showed adaptive deficits in the conceptual domain because of deficits in math skills.

d. The Court concludes that, because Applicant failed to demonstrate or even allege a deficit in either the practical or social domains, and failed to credibly prove a deficit in the conceptual domain due to deficits in math skills, *see* Proctor Addendum, at 5; *see also* 1 EHRR 33–35, 48–50, 52–53, 118, 150–54, 163 (where Dr. Proctor admitted that the second prong was "too close to call"), Applicant has failed to meet his burden of proving deficits in adaptive functioning.

167. The Court concludes that Dr. McGarrahan did consider Applicant's "risk factors," i.e., profound lack of education and prolonged methamphetamine usage, in reaching her conclusions. 2 EHRR 15–22, 25, 33–34.

a. This Court affirms its prior conclusion:

> While the Supreme Court noted that "[c]linicians rely on such [risk] factors as cause to explore the prospect of intellectual disability further," *Moore I,* [581 U.S. at 16–17], the Court did not suggest that a clinician cannot himself conclude those "risk factors" did not demonstrate intellectual disability. Rather, the Court faulted the CCA for dismissing evidence of academic failures

> as possibly attributed to these risk factors rather than intellectual disability. *Id.*

State's Ex. F, at 962, ¶216.

b. The Court concludes that while the existence of risk factors could be "cause to explore the prospect of [ID] further," *Moore I,* 581 U.S. at 16–17, the existence of these factors does not mandate ID diagnosis, and *Moore I* does not rule out the exercise of clinical judgment in consideration of these risk factors; indeed, the Supreme Court demands adherence to clinical standards and practice. *See Moore I,* 581 U.S. at 5 ("adjudications of intellectual disability should be 'informed by the views of medical experts.'" (quoting *Hall,* 572 U.S. at 721)); *see also Petetan,* 622 S.W.3d at 357–60.

c. The Court concludes Dr. McGarrahan's professional opinion took into account Applicant's profound lack of education and how it may have impacted his test scores in 2010 and now. *See* 2 EHRR 16–18.

d. The Court concludes that Dr. McGarrahan did consider, in her professional opinion as a neuropsychologist, Applicant's prior drug usage, and that Applicant's prior drug usage and lingering effects may have suppressed his original IQ scores, while explaining the later jump in scores. *See* 2 EHRR 21–22, 33–34.

e. The Court concludes there was evidentiary support for Dr. McGarrahan's conclusions regarding risk factors:

i. Dr. Proctor indicated that, in judging the potential impact of methamphetamine usage on Applicant's test results from 2010, Dr. Proctor would have found useful IQ testing "from when he was 16 before he ever used meth, and then a test after" he stopped using drugs. *See* 1 EHRR 89.

ii. The doctors had available to them Applicant's grade school records indicating Applicant was tested for special education but diagnosed only with a speech impediment and no other impairment. *See* 2 EHRR 16–17; *see also* 54 RR 321–23; 55 RR 179; State's Ex. F, at 917–18, ¶¶106–08; at 931–32, ¶¶##134(c) and (h); at 957, ¶199. The lack of a formal ID diagnosis in these existing school records supports a finding that Applicant always had the capacity to learn, 2 EHRR 34; and provides a potential "before" point of reference for judging the lingering effects of methamphetamine usage.

iii. The results of Dr. McGarrahan's recent testing provide the after comparison, and support Dr. McGarrahan's conclusion that the lingering effect of methamphetamine usage could have impacted Applicant's test scores in 2010.

iv. While Dr. Proctor and Dr. Andrews obtained "flat profiles" at the time of testing, *see* 1 EHRR 19–21; 2 EHRR 33–35, Dr. Andrews saw some variance from verbal results on the SB5 suggesting—consistent with the present scores—that his verbal skills were always in the average range. 2

EHRR 33–34; *see also* 55 RR 165 (Dr. Andrews's testing notes from sentence comprehension test indicated Applicant "Reads well" and Dr. Proctor agreed.)

168. The Court concludes that, because Applicant fails to demonstrate the first two prongs—deficits in intellectual functioning or adaptive deficits—Applicant necessarily fails to demonstrate the onset of any intellectual and adaptive deficits which occurred during childhood or adolescence, or the developmental period.

169. The Court concludes that its consideration of evidence is not confined to the four-month "snapshot" in time, when Dr. Proctor and Dr. Andrews first analyzed Applicant in 2010, simply because it occurred close to the developmental period of Applicant's life. 1 EHRR 48, 92–93.

a. Courts have routinely considered evidence well outside the developmental period when assessing ID. *See e.g., Hall,* 572 U.S. at 707 ("Hall had received nine IQ evaluations in 40 years, with scores ranging from 60 to 80, . . .but the sentencing court excluded the two scores below 70 for evidentiary reasons, leaving only scores between 71 and 80."); *see also Petetan,* 622 S.W.3d at 359 ("Appellant consistently scored within the range for intellectual disability on intelligence testing administered across decades.")

b. The DSM-5-TR anticipates that ID is a "generally lifelong" disorder, DSM-5-Tr at 43–44, such that consideration of evidence need not be limited to the developmental period, *see* DSM-5-TR, at 43 ("All criteria

(including Criterion C) must be fulfilled by history or *current presentation.*") (emphasis added).

c. No evidence supports the proposition that, in this case, "Early and ongoing interventions" resulted in "significant improvement of intellectual functioning, such that the diagnosis of intellectual developmental disorder is no longer appropriate." 1 EHRR 93–96 (citing DSM-5-Tr at 43–44); *see* EHSX 4, at 9 ("While it is recognized and understood that individuals with [ID] can learn and make gains in academic or other skills, even sometimes significantly so, the grade levels obtained by [Applicant] are dramatically outside of parameters seen in individuals with ID.").

d. Dr. McGarrahan rejected the notion that mere "guidance, instruction, and enriching environments" are all that is needed to rise out of ID. EHSX 4, at 9.

e. Dr. McGarrahan considered evidence spanning an "entire lifetime" in a separate ID case, *see* 2 EHRR 148–49; and her analysis routinely involves looking at the "entire picture" through clinical judgment. 2 EHRR 45, 65.

f. The record establishes that one does not have to actually be diagnosed as ID during the developmental period for an expert to conclude he is ID. 1 EHRR 36.

170. The Court concludes it may apply current diagnostic and legal standards to all of the evidence, including the current state of his intellectual status and the evidence that has accumulated since he was first evaluated.

171. The Court concludes that Applicant has once again failed to demonstrate that he is intellectually disabled and thus ineligible for execution, recommends that habeas relief on this issue be denied.

RECOMMENDATION

The court recommends that Applicant's ground for relief remanded to this Court be denied.

Signed this 1st day of November, 2023.

JUDGE PRESIDING
4TH JUDICIAL DISTRICT COURT
RUSK COUNTY, TEXAS

DISTRICT COURT NO. CR 09-066
(TEXAS COURT OF CRIMINAL APPEALS NO. WR-79,322-04)

Ex parte	§	IN THE 4TH JUDICIAL
BLAINE KEITH MILAM,	§	
Applicant	§	DISTRICT COURT OF
	§	
	§	RUSK COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a supplemental state habeas record in trial court cause number CR 09-066 (writ cause number 79,322-04) and transmit the same to the Court of Criminal Appeals, as provided by Article 11.071 of the Texas Code of Criminal Procedure. The supplemental state habeas record shall include certified copies of the following documents:

1. All of the parties' pleadings filed in trial court cause number CR 09-066 (writ cause number 79,322-04);

2. All transcripts and evidence from the evidentiary hearing in trial court cause number CR 09-066 (writ cause number 79,322-04);

3. Any orders entered by this Court in trial court cause number CR 09-066 (writ cause number 79,322-04);

4. This Court's findings of fact, conclusions of law and order denying relief trial court cause number CR 09-066 (writ cause number 79,322-04).

THE CLERK IS FURTHER **ORDERED** to send a copy of the Court's findings of fact and conclusions of law, including its order, to the parties:

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SIGNED this 1st day of November, 2023.

JUDGE PRESIDING
4TH JUDICIAL DISTRICT COURT
RUSK COUNTY, TEXAS

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Status as of 11/1/2023 3:13 PM CST

Associated Case Party: Blaine Milam

Name	BarNumber	Email	TimestampSubmitted	Status
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APPENDIX B

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-79,322-04

EX PARTE BLAINE KEITH MILAM, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. CR-09-066 IN THE 4TH JUDICIAL DISTRICT COURT RUSK COUNTY

Per curiam. **KELLER, P.J., filed a concurring opinion in which YEARY, KEEL, and SLAUGHTER, JJ., joined.**

O R D E R

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.[1]

In May 2010, a jury convicted Applicant of capital murder for killing his girlfriend's 13-month-old daughter. *See* TEX. PENAL CODE § 19.03(a). The jury answered the special

[1] All references to "articles" in this order refer to the Texas Code of Criminal Procedure unless otherwise specified.

issues submitted under Article 37.071. The jury also answered a special issue asking whether Applicant is intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (interpreting the Eighth Amendment to prohibit the execution of intellectually disabled individuals). In accordance with the jury's answers, the trial court set punishment at death.

This Court affirmed Applicant's conviction and sentence on direct appeal and denied relief on his initial habeas application filed pursuant to Article 11.071. *Milam v. State*, No. AP-76,379 (Tex. Crim. App. May 23, 2012) (not designated for publication); *Ex parte Milam*, No. WR-79,322-01 (Tex. Crim. App. Sept. 11, 2013) (not designated for publication). We additionally denied habeas relief on Applicant's first subsequent Article 11.071 application, in which he alleged, among other things, that his jury was not given the proper framework to consider the substantive question of whether he was intellectually disabled. *Ex parte Milam*, No. WR-79,322-02 (Tex. Crim. App. July 1, 2020) (not designated for publication). The trial court thereafter set Applicant's execution for January 21, 2021.

Applicant filed this, his second subsequent habeas application in the trial court on January 12, 2021. Therein, he raises two claims: (a) a renewed claim that he is intellectually disabled and therefore the Eighth Amendment prohibits his execution (Claim 1); and (b) an allegation that the State introduced false testimony at the punishment phase of Applicant's trial through inmate Kenneth McDade, who testified that Applicant threatened him (Claim 2). We determined that Applicant's intellectual disability allegation (Claim 1) satisfied Article 11.071, Section 5(a)(3) and remanded it to the trial court for further consideration.

After holding a live evidentiary hearing, the trial court entered findings of facts, conclusions of law, and a recommendation that we deny habeas relief on Applicant's intellectual disability claim. We have reviewed the record regarding Applicant's intellectual disability allegation and we adopt the trial court's findings of fact and conclusions of law.

Based upon the trial court's findings and conclusions and our own review, we deny habeas relief on Applicant's intellectual disability allegation (Claim 1). We dismiss Applicant's false testimony allegation (Claim 2) as an abuse of the writ.

IT IS SO ORDERED THIS THE 31st DAY OF JULY, 2024.

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